Filed 5/31/16 P. v. Alvarado CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY M. ALVARADO et al. Defendants and Appellants.	B261059 (Los Angeles County Super. Ct. No. KA099328)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed as modified.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Anthony M. Alvarado.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Jessica Contreras.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted codefendants Anthony Alvarado and Jessica Contreras of the following crimes, all committed one night against a single victim: false imprisonment, robbery, assault by means likely to cause great bodily injury, forcible sexual penetration by a foreign object (hereafter "forcible sexual penetration") and torture. On appeal, Alvarado contends: (1) jury instructions relating to the forcible sexual penetration count were flawed; (2) the trial court had a sua sponte duty to instruct on misdemeanor sexual battery and battery as lesser included offenses within forcible sexual penetration; (3) there was insufficient evidence of torture; (4) it was prejudicial error to admit evidence of statements the victim made to police; (5) the pattern flight instruction violates due process; (6) it was error to stay the sentence imposed on the torture count pursuant to section 654 rather than section 667.61; and (7) the People concede that Alvarado's presentence custody credits were miscalculated. Contreras makes similar contentions regarding the instructions relating to the forcible sexual penetration count and also purports to join in Alvarado's other contentions.[1] We modify the judgment to correct Alvarado's presentence custody credits and otherwise affirm.

FACTS

A. *The People's Case*

1. Christopher D.

Viewed in accordance with the usual rules of appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*)), the evidence established that on September 7, 2012, victim Christopher D. was about 28 years old and lived with his father in an apartment in Covina. Christopher's friend, Mehdi D. lived in the same apartment complex.

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[1] A party may join the contentions of another party (Cal. Rules of Court, rule 8.200(a)(5)), but cursory joinder is not enough. The joining party still has the burden of demonstrating error and prejudice as to him. (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11.) Although Contreras has purported to join in each of Alvarado's contentions, unless Contreras has explained how a specific contention made by Alvarado relates to her, we analyze Alvarado's contentions only as they relate to him.

Christopher recalled that he and another friend, Daniel F., were at Mehdi's apartment while they tried to find female friends to socialize with that night. At the time, Mehdi and Daniel knew Christopher had not "been with a girl" for awhile. After they were turned down by several women, Mehdi said he knew someone they could "hook up with." There was conflicting evidence as to whether Mehdi identified the woman by name, but it is undisputed that Mehdi was referring to defendant Contreras. Christopher understood she was someone Mehdi had dated a few times; Christopher did not know that Mehdi had sex with her or that she worked as a stripper or prostitute. Mehdi made the arrangements which Christopher understood were to collect Contreras at the Days Inn Hotel in West Covina where she lived and take her elsewhere, maybe back to Mehdi's apartment, to "hang out."

Daniel drove Christopher and Mehdi to the hotel where they arrived at about 2:00 a.m. (on September 8). Christopher had some keys, a cell phone and about $3 in his pocket. Christopher was feeling the effects of alcohol he drank earlier in the evening but was not drunk. While Daniel and Mehdi waited in the car, Christopher went to Contreras's hotel room. Contreras opened the door in response to Christopher's knock, they introduced themselves to one another and shook hands. When Contreras stepped to the side, Christopher understood it as an invitation to enter the room. Christopher sat down on one of the two beds in the room. Christopher believed he and Contreras were alone in the room. In response to Christopher asking if Contreras was ready to go, Contreras asked Christopher what he wanted and how much. Christopher laughed and said he had no money and was not there as a client, just to "go hang out." Sensing that his response had upset Contreras, Christopher began to feel uneasy and got up to leave. But defendant Alvarado suddenly emerged from the bathroom and hit Christopher in the back of the head. During the brutal beating that followed, Alvarado repeatedly hit Christopher "as hard as somebody can possibly punch somebody." Alvarado continued hitting Christopher even after Christopher was on the ground, curled into the fetal position and begging Alvarado to stop. While Alvarado was hitting him, Christopher could hear Contreras laughing.

Alvarado continued beating Christopher until Christopher was lying face down on the ground and Alvarado was on top of him. Defendants ripped up bed sheets which they used to tie Christopher's arms and legs. While he was face down on the ground and tied up, Christopher could feel defendants rummaging through his pants pockets. Contreras complained that Christopher had no money. Contreras said, "How do you feel about being raped?" and "Do you want to get fucked?" When Christopher turned his head to look towards Contreras, one of the defendants, Christopher was not sure which, tased him.[2] Christopher's pants and underwear were pulled down and he was anally penetrated two or three times with an object later determined to be Contreras's curling iron. Because Alvarado was still sitting on Christopher's back and holding him down, Christopher deduced it was Contreras performing the act of penetration. Contreras used her cell phone to take photographs of Christopher during the assault. In one of the photographs, Christopher can be seen tied up on the floor with a curling iron protruding from between his buttocks.

In addition to the rape, while Christopher was tied up and lying face down on the ground, defendants repeatedly tased Christopher and yelled questions at him. Contreras yelled, "Don't fucking look at me. Stay the fuck down. Who are you? Why do you know my name?" Contreras did not believe Christopher when he said she had told him her name. In addition to asking how Christopher knew Contreras's name, Alvarado yelled questions at Christopher about where he lived and who he was with. Christopher told them his address and said he was there with Mehdi and Danny. The information that Christopher was not alone seemed to make defendants nervous. While Christopher remained tied up and face down on the ground, he heard Contreras running around the room collecting things; Contreras and Alvarado went in and out of the room several times. When they left the room the last time, they took the cell phone, keys and $3 that had been in Christopher's pocket.

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[2] At trial, Christopher was unsure which defendant tased him, but when Christopher spoke to the police a few hours after the incident, he said Contreras was tasing him.

Christopher waited 10 or 15 seconds before struggling to stand and pull up his pants. Christopher still had remnants of the torn sheets tied to his arms and legs when he ran out of the room to where Daniel and Mehdi were waiting for him in the parked car. It was obvious from his appearance that he had been beaten but Christopher did not tell his friends what had happened; he just told Daniel to drive. At the hospital to which Daniel took Christopher, Christopher told the medical staff that he had been in a bar fight because he did not want anyone to know what had happened to him. They left the hospital because Christopher did not have insurance. When Christopher was contacted by a police officer later that morning, he told the officer what defendants had done to him.

2. Daniel and Mehdi

Daniel and Mehdi both testified. While waiting for Christopher, they became concerned and tried calling his cell phone. At some point they saw Alvarado on the balcony near room 301. Alvarado told them he had marijuana in the room and invited them up, but when they got there Alvarado's demeanor changed and he became aggressive. Eventually, Alvarado went downstairs, leaving Daniel and Mehdi standing in front of the room. A little while later, they saw Alvarado and Contreras leaving the hotel in a rush. Daniel and Mehdi followed defendants to the hotel next door. Daniel tried to memorize the license plate number of the Jeep they were driving. As they were driving back to the Days Inn, Alvarado flagged them down and asked where they were from. Alvarado said, "Go get your homey. You are next."

Mehdi testified that, after the attack, Contreras called him repeatedly from Christopher's cell phone. In one such call, Contreras said, "I raped your friend, put a curling iron in his butt . . . ." Contreras said she was going to send the picture she had taken to "all of his friends on the contact list from his phone."

3. The Investigation

Officer Keith Sutherland of the Covina Police Department pulled up behind Daniel as he parked in front of the apartment building after leaving the hospital. Sutherland explained he was investigating a report from the hospital "about somebody

being beat up pretty bad." Christopher at first repeated the bar fight story, but eventually told Sutherland what defendants had done to him in the hotel room that night. Because the crime had occurred in West Covina, Sutherland contacted the West Covina Police Department.

When Detective Neomi Wiley of the West Covina Police Department responded to the scene, Sutherland told her what Christopher had told him. After interviewing Christopher at the scene, Wiley brought him back to the hospital where Christopher underwent a rape examination. Injuries consistent with forcible sexual penetration by a curling iron were discovered. Christopher's demeanor during the examination was consistent with a sexual assault victim.

The police recorded pretext calls Daniel and Mehdi made to defendants. The recordings were introduced into evidence against Contreras, only. In one call, Contreras suggests she beat up Christopher because he arrived with no money, taunted her and mentioned her and her son's names. Contreras said she had a picture of Christopher "with my curling iron up his ass, so next time, don't act fucking stupid, Mehdi, all right?" And, "If I wanted to I could send all the pictures of him butt naked with my curling iron up his ass to all his contacts, all right? So don't fuck with me no more 'cause we know where the fuck you guys live."

Police carrying out a search warrant at Alvarado's home recovered clothing which tested positive for blood. Further testing established that the blood contained Christopher's DNA. Contreras's DNA was found on the curling iron.

B. *The Defense Case for Contreras*

Contreras, the only defense witness, described a starkly different encounter. It was a version of events Contreras revealed for the first time at trial. Contreras testified that she was a prostitute and usually worked at the Days Inn Hotel in West Covina. Mehdi was once her client, but by September 7, 2012, Mehdi had not been a client for several months because he did not want to pay for her services. That day, Alvarado dropped Contreras off at the hotel at about noon. In an exchange of texts at about 8:00 p.m. that night, Contreras scheduled a 2:30 a.m. appointment with what she believed was

a new client; the client agreed to pay $80 for half an hour. At about 1:30 a.m., Contreras and Alvarado returned to the hotel after running an errand. As was their custom, Alvarado left Contreras alone in the room while he walked around the hotel or sat in his car. At the appointed time, Christopher arrived at Contreras's hotel room; he smelled of alcohol, which was not unusual for clients. Christopher introduced himself to Contreras as "Michael." At Contreras's invitation, Christopher came into the room and sat down on one of the two beds. Contreras asked Christopher whether he wanted more than the agreed upon half hour. Christopher responded, "What are you doing here?" Thinking he was kidding, Contreras said, "You know what I'm doing here, what are you doing here?" Christopher said he was a friend and was there to check out the room. At that moment, Contreras received a text from the number which had been used to make the appointment. The message said, "Hey, I'm in front of 301 at Five Star Inn, open the door." Contreras "freaked out" because she thought Christopher was a stranger and not the man with whom she had made the appointment. Contreras's first thought was to leave. But when she looked through the peephole in the hotel room door, she saw two strange men standing outside the room. Next, Contreras went into the bathroom and called Alvarado, but the call went to his voice mail. While she waited in the bathroom for Alvarado, Contreras heard Christopher tearing the bed sheets. Contreras walked out of the bathroom and yelled at Christopher to leave. Christopher grabbed her and pushed her onto one of the beds. A struggle ensued during which Contreras hit Christopher as hard as she could a number of times. Contreras explained that she was able to prevail over Christopher in the fight because Christopher was inebriated and she was not. Still afraid to leave the room because of the two men standing outside, Contreras used the torn sheets to tie up Christopher so that he could not hurt her. Contreras did not recall tasing Christopher. Contreras placed her curling iron under Christopher for a photograph, but she never anally penetrated Christopher with the curling iron. Contreras wanted to have an embarrassing picture of Christopher to use as protection. After Christopher was tied up, Contreras called Alvarado again and told him to come to the hotel. While packing her things in pillow cases, Contreras packed Christopher's cell phone by accident. When

Alvarado arrived he did not enter the room; Contreras met him at the door, gave him her things and told him to put them in his Jeep. As she was leaving with Alvarado, Contreras saw two men walking away; Contreras thought she recognized one of the men as Mehdi. Later, Contreras came to the conclusion that Mehdi had organized the whole thing.

C. *The Defense Case for Alvarado*

Alvarado did not present any evidence.

PROCEDURAL BACKGROUND

Alvarado and Contreras were jointly charged by information with sexual penetration by a foreign object (§ 289, subd. (a)(1)(A), count 1); first degree robbery (§ 211, count 2); assault with a deadly weapon (§ 245, subd. (a)(1), count 3); false imprisonment (§ 236, count 4); torture (§ 206, count 5) and assault by means likely to create great bodily injury (§ 245, subd. (a)(4), count 6); various enhancements were also alleged.[3]

Defendants were jointly tried. The jury was unable to reach a unanimous verdict on count 3 (§ 245, subd. (a)(1) [assault with a deadly weapon]), but found defendants guilty on all other counts. As to count 1 (forcible sexual penetration), the jury found true enhancements for inflicting torture (§ 667.61, subds. (a), (d)) and tying or binding the victim (§ 667.61, subds. (a), (e)). The jury found enhancements for *personal* infliction of great bodily injury *not true* on count 1 (forcible sexual penetration) but *true* on count 5 (torture).

Alvarado was sentenced to a total of 29 years to life in prison. Contreras was sentenced to a total of 36 years to life in prison.[4] Defendants timely appealed.

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[3] All undesignated statutory references are to the Penal Code.

[4] Whereas Contreras was sentenced to a consecutive seven years to life on count 5 (torture), Alvarado's lower term reflects a section 654 stay of the life sentence imposed on that count.

DISCUSSION

A. Admissibility of Christopher's Statement to Sutherland and Sutherland's Statement to Wiley

Over a defense hearsay objection, the trial court admitted into evidence: (1) Sutherland's testimony recounting what Christopher told him at the scene and (2) Wiley's testimony recounting what Sutherland told her about what Christopher had said. Alvarado contends it was error to admit both statements because neither satisfies the hearsay exceptions the trial court identified when it overruled the hearsay objection. Alvarado argues that Christopher's statement to Sutherland did not qualify as a "prior consistent statement" under Evidence Code section 791 because the statement was not made before Christopher had a motive to fabricate; and Sutherland's statement to Wiley did not qualify under the state of mind exception because Wiley's state of mind was not relevant to any issue. We conclude Christopher's statement to Sutherland was admissible as a prior consistent statement. As we discuss, we need not decide whether Sutherland's statement to Wiley was inadmissible hearsay because any error in admitting the challenged evidence was harmless.

1. Standard of Review

With exceptions, evidence of a statement made other than by a witness while testifying, offered for the proof of the matter stated, is inadmissible hearsay. (Evid. Code, § 1200.) Relevant here are the exceptions for prior consistent statements (Evid. Code, § 1236) and state of mind (Evid. Code, § 1250).

The trial court is vested with broad discretion in determining the admissibility of evidence, including application of the hearsay rule and its exceptions. (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 386.) The erroneous admission of evidence is grounds for reversal only if its admission resulted in a miscarriage of justice. (Evid. Code, § 353.) To establish a miscarriage of justice, the appellant must show a reasonable probability the outcome of trial would have been different if the challenged evidence had been excluded. (*People* v. *Champion* (1995) 9 Cal.4th 879, 919 (*Champion*), citing *People v. Watson*

(1956) 46 Cal.2d 818, 836 [A " 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."].)

2. Sutherland's Testimony and the Prior Consistent Statement Exception

a. Sutherland's Challenged Evidence

Sutherland testified that at about 6:12 a.m. on September 8, 2012, he was dispatched to the 1500 block of East Dexter to do a "welfare check" on "Chris." As he pulled up to the location, Sutherland observed three people in a parked car. All three people got out of the car. Christopher appeared "really distraught" and the injuries on his face suggested he had been involved in an altercation. Sutherland was skeptical of Christopher's story that he was injured in a bar fight. Suspecting Christopher might not want to talk in front of his friends, Sutherland moved Christopher away. Sutherland talked to Christopher for awhile, trying to build trust. Eventually, Christopher changed his statement as to what occurred. Alvarado's counsel objected on hearsay grounds to the prosecutor's next question: "And then what did he tell you?" The trial court said, "Prior statement?" to which the prosecutor responded "Yes." The trial court overruled the objection. Whereupon, Sutherland testified that Christopher told Sutherland that "he had gone to a hotel room to meet with a female and while he was at the hotel room by himself he was bound and something was inserted into his rectum."

b. The Prior Consistent Statement Exception

The prior consistent statement exception (pursuant to which the trial court admitted Sutherland's testimony recounting what Christopher told him) is set forth in Evidence Code section 1236. Under that section, evidence of a witness's prior out-of-court statement "is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." (Evid. Code, § 1236.) To comply with Evidence Code section 791, the prior consistent statement must be offered either (a) after an inconsistent statement is introduced and the prior consistent statement was made *before* the alleged inconsistent

statement; or (b) after there is an express or implied charge that the witness's hearing testimony is recently fabricated and the prior statement was made "before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

Sutherland's testimony relating what Christopher told him falls within the prior consistent statement exception because it was offered in compliance with section 791, subdivision (b).[5] The theory of the defense was that Christopher and Contreras were alone in the hotel room that night; Christopher attacked Contreras; Contreras did no more than defend herself against Christopher's attack; she did not tase Christopher or rape him with a curling iron; Alvarado arrived after the altercation was over and never entered the hotel room. Implicit in this defense is that Christopher's trial testimony was fabricated. Thus, Christopher's statement to Sutherland, which was consistent with his trial testimony, was admissible as a prior consistent statement. Defendants have not shown what "bias, motive for fabrication, or other improper motive" Christopher could possibly have had to tell Sutherland a fabricated story about being raped.

Having concluded that Christopher's statement to Sutherland was admissible under the prior consistent statement exception to the hearsay rule, we next consider the admissibility of Sutherland's statement to Wiley.

3. Wiley's Testimony and the State of Mind Exception

Sutherland testified that, because the hotel where the incident occurred was located in West Covina, he contacted the West Covina Police Department. Sutherland told the West Covina officer who arrived at the scene what Christopher had said, then handed the investigation over to that officer.

Wiley, the West Covina Police Department officer who responded to Sutherland's call, testified that when she arrived at the location, Sutherland explained he had been dispatched to investigate a report that a male subject told medical staff at Intercommunity

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[5] Arguably, the evidence did not comply with section 791, subdivision (a) because Christopher made the inconsistent statement – that he was injured in a bar fight – *before* he made the alleged prior consistent statement – that he was injured in the attack by defendants. Thus, the alleged prior consistent statement was not made before the alleged inconsistent statement as required by section 791, subdivision (a).

Hospital that he had been in a bar fight, but left the hospital without treatment; the hospital called the Covina Police Department because they were concerned about the man's injuries. Sutherland said he "went out there to check on the male subject. And the male subject, Christopher, told [Sutherland] that he had been raped at the Days Inn Hotel in West Covina." The trial court overruled defendant's hearsay objection and admonished the jury that Wiley's testimony "is being offered not for the truth of the content of the statement but simply to show the state of mind of this officer in terms of explaining her later conduct acting on that information."

We need not decide whether the challenged evidence falls within the state of mind exception to the hearsay rule because admission of such evidence was harmless. Christopher testified at length about what happened to him in the hotel room that night. Later that morning, Christopher told first Sutherland and then Wiley what happened. Both officers testified in detail about what Christopher told them. Photographs Contreras admits she took of Christopher during the incident were introduced into evidence. On this record, there is no reasonable probability the outcome of trial would have been different if the trial court had excluded Wiley's testimony recounting what Sutherland told her. (*Champion, supra*, 9 Cal.4th at p. 919.)

B. Sufficiency of the Evidence of Torture

Alvarado contends he was denied due process under the federal and state Constitutions because the torture conviction (§ 206; count 5) is not supported by substantial evidence. He argues there was no evidence that Alvarado "specifically intended to cause extreme physical pain, or that he did so for a sadistic purpose." We find no error.

1. Standard of Review

The standard of review for a challenge to the sufficiency of the evidence is well settled. We must review the whole record in the light most favorable to the prosecution, presuming in support of the judgment the existence of every fact the jury could reasonably have deduced, to determine whether there is evidence that is reasonable,

credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Zamudio, supra*, 43 Cal.4th at p. 357.)

2. Statutory Elements of Torture

"Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture." (§ 206.) Section 12022.7 defines great bodily injury as "significant or substantial physical injury." (§ 12022.7, subd. (f).)

In the context of the torture-murder special circumstance instruction, our Supreme Court observed that the term "sadistic purpose" is "a term in common usage, having a relatively precise meaning, that is, the infliction of pain on another person for the purpose of experiencing pleasure." (*People v. Raley* (1992) 2 Cal.4th 870, 901.) The intent to cause the severe pain that is an element of torture "can be inferred from the circumstances of the offense, such as a focused attack on a particularly vulnerable area. [Citation.]" (*People v. Assad* (2010) 189 Cal.App.4th 187, 196, citing *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) A " 'jury could reasonably determine that a person who deliberately strikes his victim on an area of the body that is already injured has the intent to cause severe pain.' " (*Assad, supra*, at p. 196.)

3. Analysis

Here, the evidence established that Christopher was lying face down on the ground with his arms and legs tied while defendants yelled questions at him, repeatedly tased him and used a curling iron to sexually penetrate him two or three times. That defendants' purpose was "revenge, extortion, persuasion, or . . . any sadistic purpose" can be inferred from the evidence. Specifically, a reasonable trier of fact could infer that defendants repeatedly tased Christopher for the purpose of persuading him to answer the questions they were yelling at him. From the evidence that the sexual penetration occurred after defendants discovered that Christopher had no money, it is reasonable to infer defendants' purpose was to punish (i.e. take revenge on) Christopher for having no money when he arrived for his appointment with Contreras. That defendants acted with a

sadistic purpose can be inferred from the evidence that Contreras was laughing while Christopher was being attacked, that Christopher was tased multiple times on the same area of his body and that the sexual penetration was repeated two or three times.

C. Challenges to the Jury Instructions

Alvarado and Contreras make the following contentions regarding the jury instructions relating to count 1, violation of section 289 (sexual penetration): (1) it was prejudicial error to incorrectly instruct the jury that forcible sexual penetration was a "general intent" rather than a "specific intent" crime and (2) the instructions did not define "sexual abuse." In addition, Alvarado contends: (1) the trial court erred in failing to instruct on misdemeanor sexual battery (§ 243.4, subd. (e)(1)) and misdemeanor battery (§ 242) as lesser included offenses within forcible sexual penetration (§ 289); and (2) CALCRIM No. 372 (flight) violates due process.

1. Standard of Review

The trial court has a sua sponte duty to instruct "on the essential elements of an offense [citation], and ' "on the general principles of law governing the case, i.e., those principles of law commonly or closely and openly connected with the facts of the case before the court' " ' [citation.] 'An appellate court reviews the wording of a jury instruction de novo' . . . [citation] and determines whether 'the instructions are complete and correctly state the law.' [Citation.]" (*People v. Delacerda* (2015) 236 Cal.App.4th 282, 288.)

Generally, " '[f]ailure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818, 819, [Citation.]' [Citation.]" (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1535.) But, when the jury is " 'misinstructed on an element of the offense . . . reversal . . . is required unless we are able to conclude that the error was harmless beyond a reasonable doubt.' [Citations.]" (See *People v. Wilkins* (2013) 56 Cal.4th 333, 348.) The "beyond a reasonable doubt" standard is often referred to as the "*Chapman* standard." (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

2. Classification of Sexual Penetration as a General or Specific Intent Crime

Defendants were charged in count 1 with violation of section 289, subdivision (a)(1)(A), which makes it a felony to commit "an act of sexual penetration when the act is accomplished against the victim's will by means of force . . . ." (§ 289, subd. (a)(1)(A).) As used in section 289, " '[s]exual penetration' is the act of causing the penetration, however slight, of the genital or anal opening of any person . . . for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd.(k)(1).)

The trial court has a sua sponte duty to instruct on the general principles of law relevant to and governing the case. (*People v. Clark* (1997) 55 Cal.App.4th 709, 714.) This includes whether the crime is one of general or specific intent. (*Id*. at p. 715.) But whether section 289, describes a general or specific intent crime is not settled.

a. Sexual Penetration is a Specific Intent Crime

In *People v. Dillon* (2009) 174 Cal.App.4th 1367, 1380, the First District held forcible sexual penetration was a general intent crime. In *McCoy, supra,* the Third District held it was a specific intent crime, an element of which is committing the act of penetration with "the specific intent to gain sexual arousal or gratification or to inflict abuse on the victim." (215 Cal.App.4th. at p. 1538.) Most recently, in *People v. ZarateCastillo* (2016) 244 Cal.App.4th 1161, the Third District expressly disagreed with *Dillon, supra,* and reiterated its conclusion that forcible sexual penetration is a specific intent crime because it requires the act of penetration to be done with the intent to gain sexual arousal or gratification or to inflict abuse on the victim. (*ZarateCarrillo*, at pp. 1167-1168, citing *McCoy*, at p. 1541.)

We find the analysis of *McCoy* and *ZarateCastillo* persuasive and agree with those courts that forcible sexual penetration in violation of section 289, subdivision (a)(1) is a specific intent crime. As such, it is the People's burden to prove the defendant committed the act of penetration with the intent to gain sexual arousal or gratification or to inflict sexual abuse on the victim. Accordingly, the trial court erred in instructing that forcible sexual penetration was a general intent crime. But our inquiry does not end here,

because we must determine whether the error was prejudicial. We conclude that it was not.

b. Harmless Error Analysis

Whether the *Watson* harmless error standard or the more stringent *Chapman* standard is applicable to the incorrect identification of forcible penetration as a general intent crime, and the concomitant failure to identify it as a specific intent crime by separate instruction, is not settled. (See *People v. Ngo* (2014) 225 Cal.App.4th 126, 162 [noting the unsettled nature of the issue but deciding the error was harmless "even under" the more stringent *Chapman* standard]; *ZarateCastillo, supra*, 244 Cal.App.4th at p. 1168 [applying *Chapman* standard without discussion].) We need not decide which standard applies because we find the error harmless even under the more stringent *Chapman* standard.

Our Supreme Court has observed that classifying an offense as a general intent or specific intent crime is not always meaningful because " ' "[t]he critical issue is the accurate description of the state of mind required for the particular crime. . . ." [Citations.]' [Citation.]" (*People v. Rathert* (2000) 24 Cal.4th 200, 205.) Classification is necessary " 'when the court must determine whether a defense of voluntary intoxication or mental disease, defect, or disorder is available; whether evidence thereon is admissible; or whether appropriate jury instructions are thereby required. [Citation.]' [Citation.]" (*Ibid.*)

In *ZarateCastillo*, incorrectly instructing that forcible sexual penetration was a general intent crime was found to be harmless error. The appellate court reasoned that the jury was instructed that the People had to prove the defendant committed an act of sexual penetration; the instructions defined penetration as "penetration, however slight, of the genital or anal opening of the other person for the purpose of sexual abuse, arousal or gratification. . . . ." (244 Cal.App.4th at p. 1167.) Thus, despite failing to classify it as a specific intent crime, the trial court "actually instructed the jury on the specific intent" required for that crime. (*Id*. at p. 1168.) The *ZarateCastillo* court concluded there was "simply no reason to believe that the jury would have disregarded the explicit direction of

the later instructions because of, at best, a mere implication arising from the earlier instructions. Nor is there any basis for believing that the jury could have, under any circumstances, rationally found that defendant penetrated the victim's vagina for any purpose other than sexual abuse, arousal, or gratification. Under these circumstances, the trial court's instructional error was harmless beyond a reasonable doubt." (*Id*. at p. 1169.)

As in *ZarateCastillo*, the jury in this case was incorrectly instructed that forcible sexual penetration was a general intent crime (CALCRIM No. 252) but was also instructed that the People had to prove defendant committed an act of sexual penetration, which the instructions defined as "penetration, however slight, of the genital or anal opening of the other person *for the purpose of* sexual abuse, arousal, or gratification." (CALCRIM No. 1045, italics added.) Closing arguments did not focus on the "for the purpose of sexual abuse" element of the forcible sexual penetration instruction. Contreras's theory of defense was that there was no penetration. Alvarado's theory was that he was not in the hotel room that night. The prosecutor argued that defendants were motivated by a desire for "revenge;" their intent was to "intimidate and inflict fear."

Nothing counsel said during closing arguments suggested to the jury that it should disregard the explicit direction of CALCRIM No. 1054 and there is no reason to believe the jury did so. In light of evidence that, before the forcible sexual penetration occurred Contreras said, "How do you feel about being raped?" and "Do you want to get fucked?" and in the recorded pretext calls Contreras said she had a picture of Christopher "with my curling iron up his ass," there is no basis for believing the jury could have rationally found defendants committed the act of forcible penetration for any purpose other than sexual abuse. Under these circumstances, the trial court's instructional error was harmless beyond a reasonable doubt.

3. Instructions Defining "Sexual Abuse"

Alvarado contends the trial court prejudicially erred in failing to sua sponte define the term "sexual abuse" for purposes of forcible sexual penetration. He argues the term has a specialized legal definition. We disagree.

Trial courts have a duty to define technical terms that have meanings peculiar to the law, but "no duty to clarify, amplify, or otherwise instruct on commonly understood words or terms used in statutes or jury instructions. 'When a word or phrase " 'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.' " [Citations.] A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that differs from its nonlegal meaning. [Citation.]' [Citation.]" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1022.)

Section 289 defines *sexual penetration* as "the act of causing the penetration, however slight, of the genital or anal opening of any person . . . *for the purpose of sexual* arousal, gratification, or *abuse* by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd. (k)(1), italics added.) A plain reading of section 289, subdivision (k)(1) supports a conclusion that the Legislature did not intend "sexual abuse" to be given any specialized legal definition that differs from the commonly understood meaning of "sexual abuse."

The American Heritage Dictionary includes the following definition of *abuse*: "3. Physical maltreatment." (American Heritage Dictionary (2d College ed. 1982) p. 70.) The same dictionary defines *sexual* as "1. Of, pertaining to, affecting, or characteristic of sex, the sexes, or the sex organs and their functions." (*Id.* at p. 1124.) Thus, the commonly understood meaning of "sexual abuse" would be physical maltreatment of the sex organs, which we believe any reasonable trier of fact would understand as including the rectum.

People v. White (1986) 179 Cal.App.3d 193 (*White*) offers guidance. The defendant in *White* was convicted of forcible sexual penetration in violation of section 289, subdivision (a). On appeal, he contended the jury instructions improperly allowed conviction "without proof that the defendant entertained a sexual intent when

committing the proscribed acts." (*Id*. at p. 203.)[6] The People countered that conduct causing pain or injury to the victim's " 'sexual or "private" ' parts . . . would certainly be considered sexual abuse.' " (*Id*. at p. 205.) The appellate court concluded the People's was "the only interpretation of 'sexual abuse' that is reasonable." (*Id*. at p. 205.) It "is the nature of the act that renders the abuse 'sexual' and not the motivations of the perpetrator." (*Ibid*.)

Consistent with *White*, CALCRIM No. 1045 includes the following optional sentence: "Penetration for sexual abuse means penetration for the purpose of causing pain, injury, or discomfort." Here, the trial court gave CALCRIM No. 1045, but did not include the optional sentence quoted above. Relying on *White, supra*, 179 Cal.App.3d 193, Alvarado argues this was error because "sexual abuse" has a specialized legal definition. But *White* stands for the proposition that the phrase "for the purpose of sexual . . . abuse" in section 289, subdivision (k)(1), means any act directed against the victim's sexual or private parts, which is committed for the purpose of causing pain or injury to the victim. This is consistent with the dictionary definitions of "abuse" and "sexual." The *White* court did not ascribe any specialized legal definition of the term "sexual abuse." As such, the trial court was not required to give the optional definition of "sexual abuse" included in CALCRIM No. 1045.

4. Sua Sponte Instructions on Sexual Battery (§ 243.4, subd. (e)(1)) and Battery (§ 242) as Lesser Included Offenses of Forcible Sexual Penetration

Alvarado contends the trial court erred in failing to sua sponte instruct on misdemeanor sexual battery and battery. He argues (1) sexual battery and battery are necessarily included offenses within forcible sexual penetration and (2) Contreras's testimony that she staged the photograph by placing the curling iron under Christopher's

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6 In *White, supra*, the jury was given CALJIC No. 10.60, which includes in the definition of forcible sexual penetration that "the penetration was done with the purpose and specific intent to cause sexual gratification, arousal or abuse." In this case, the jury was given CALCRIM No. 1045, which defines *sexual penetration* as "penetration, however slight, of the genital or anal opening of the other person for the purpose of sexual abuse, arousal, or gratification."

stomach was substantial evidence that defendants committed the lesser but not the greater offense. We find no error.

a. Applicable Principals

"The California Supreme Court has defined a lesser offense as necessarily included within the charged offense 'if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' [Citations.]" (*People v. Ortega* (2015) 240 Cal.App.4th 956, 965 (*Ortega*.)

The " 'existence of "any evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.]' " (*People v. Hughes* (2002) 27 Cal.4th 287, 366 (*Hughes*).)

The standard of review for failure to instruct on a lesser included offense is de novo. (*People v. Woods* (2015) 241 Cal.App.4th 461, 475.) Under that standard, we consider the evidence in the light most favorable to the defendant. The question is not whether the evidence supports conviction of the greater crime; it is "whether, in assessing and weighing the evidence independently, the jury could have reasonably concluded that [the defendant] committed" the lesser crime but not the greater. (*Ibid*.)

In a non-capital case, failure to instruct on a lesser included offense "does not require reversal 'unless an examination of the entire record establishes a reasonable probability that the error affected the outcome.' [Citations.]" (*People v. Wyatt* (2012) 55 Cal.4th 694, 698; see also *People v. Breverman* (1998) 19 Cal.4th 142, 178.) We turn next to the questions of whether sexual battery and battery are lesser included offenses within forcible sexual penetration and, if so, whether there was evidence warranting instruction on those lesser offenses.

b. Misdemeanor Sexual Battery

As previously stated, section 289, subdivision (a)(1)(A) makes it a crime to "commit[] an act of sexual penetration when the act is accomplished against the victim's

will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ." As used in section 289, " 'Sexual penetration' is the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object."

Sexual battery is defined in section 243.4(e)(1), which makes it a crime to "touch[] an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery, . . . [¶] (2) As used in this subdivision, 'touches' means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim. [¶] (f) As used in subdivisions (a), (b), (c), and (d), 'touches' means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense." " 'Sexual battery' does not include the crimes defined in Section 261 or 289." (§ 243.4, subd. (g).)

In *Ortega*, the court found sexual battery in violation of section 243.4, subdivision (e)(1) is not a lesser necessarily included offense within forcible sexual penetration in violation of section 289, subdivision (a)(1)(A) under the statutory elements test. (*Ortega*, *supra*, 240 Cal.App.4th at pp. 966-967.) The *Ortega* court explained: "The sexual battery statute does not encompass touching by a foreign object other than the offender's body. In contrast, sexual penetration by force is not limited to physical contact and can be broader: Penetration may be caused 'by any foreign object, substance, instrument, or device, or by any unknown object.' (§ 289, subd. (k)(1).)" Since forcible sexual penetration could be committed without the touching required to commit sexual battery, the *Ortega* court concluded sexual battery is not a lesser included offense within forcible sexual penetration.

We find the *Ortega* court's reasoning persuasive and adopt it here. Sexual battery in violation of section 243.4, subdivision (e)(1) is not a lesser included offense within forcible sexual penetration in violation of section 289, subdivision (a)(1)(A). [7]

c. Misdemeanor Battery (§ 242)

"A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) Although there are no cases squarely on point, defendant relies on *Hughes, supra,* 27 Cal.4th 287, in which our Supreme Court held that battery was a lesser included offense of forcible sodomy. (*Id.* at p. 366.)

Assuming misdemeanor battery in violation of section 242 is a lesser included offense within forcible sexual penetration in violation of section 289, subdivision (a)(1)(A), there was no substantial evidence that defendants committed the lesser but not the greater offense. *Hughes* offers guidance. In that case, the defendant was convicted of first degree murder, first degree robbery, first degree burglary and sodomy. The jury found true the special circumstance that the murder was committed during the perpetration of burglary, robbery and forcible sodomy. Rejecting the defendant's argument that the trial court had a sua sponte duty to instruct on misdemeanor battery as a lesser included offense within forcible sodomy, the *Hughes* court explained: "the pathologist testified that the bruises found inside the victim's rectum were consistent with penetration by either a penis or a finger (or another blunt foreign object), and there was no physical evidence of penile penetration (such as sperm or pubic hairs). None of this, however, amounts to substantial evidence that defendant was guilty of battery but not forcible sodomy." (*Hughes, supra,* 27 Cal.4th at p. 367.)

Considering the evidence in the light most favorable to defendants in this case, we conclude there was no substantial evidence from which a reasonable trier of fact could conclude defendants committed misdemeanor battery, but did not commit forcible sexual

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[7] Although the *Ortega* court found sexual battery to be a lesser included offense within forcible sexual penetration under the accusatory pleading test in that case, Alvarado makes no such argument. As such, we treat the issue as waived. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

penetration. In light of the rape examination results and the recorded statements Contreras made during the pretext calls, Contreras's testimony that she staged the photograph showing the curling iron protruding from Christopher's buttocks by placing it under his stomach is inherently implausible and for that reason not " 'evidence that a reasonable jury could find persuasive.' [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 645.)

5. CALCRIM No. 372

As given, CALCRIM No. 372 reads:

> "If a defendant fled immediately after the crime was committed, that conduct may show that he or she was aware of his or her guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

Alvarado contends CALCRIM No. 372 "embodies an irrational permissive inference in violation of due process." He argues inferring guilt from flight is impermissible because there is no rational basis for connecting guilt and flight. We disagree.

An argument identical to the one Alvarado makes here was rejected in *People v. HernandezRios* (2007) 151 Cal.App.4th 1154, 1157-1158. Alvarado argues *HernandezRios* was wrongly decided. We find the reasoning of *HernandezRios* persuasive and adopt it here: CALCRIM No. 372 does not impermissibly presume the existence of guilt from flight and does not lower the prosecution's burden of proof.

6. Cumulative Instructional Error

Defendants contend the instructional errors were cumulatively prejudicial, even if individually harmless. We have found just one instructional error: mischaracterizing the forcible sexual penetration as a general intent crime when it is, in fact, a specific intent crime. We found the error harmless. (See section C.2.) As we have found no other instructional errors, the contention that the instructional errors are cumulatively prejudicial necessarily fails.

D. Sentence on Count 5 (Torture)

Alvarado contends the matter should be remanded for resentencing because the trial court erred in staying the life sentence imposed on count 5 (torture) pursuant to section 654, rather than section 667.61, subdivision (f). He argues that, because the 25-year-to-life sentence on count 1 (forcible sexual penetration) was based on a section 667.61, subdivision (d) special circumstance, sentence on count 5 should have been stayed pursuant to section 667.61, subdivision (f), not section 654. We find no error.

Torture is punishable by life in prison. (§ 206.1; see § 3046, subd. (a)(1) [generally, "inmate imprisoned under a life sentence shall not be paroled until he or she has served a minimum of seven calendar years"].) When it is pled and proved that the defendant personally inflicted great bodily injury in the commission of the torture, the defendant must be sentenced to an additional three years. (§ 12022.7, subd. (a).)

Forcible sexual penetration is generally punishable by three, six or eight years in prison. (§ 289, subd. (a)(1)(A).) But forcible sexual penetration is one of the crimes identified in section 667.61, subdivision (a), which mandates imposition of a 25-year-to-life sentence when it is pled and proved that it was committed under at least one of the circumstances specified in subdivision (d) of the statute. (§ 667.61, subd. (c)(5) [specifying forcible sexual penetration].)[8] Section 667.61, subdivision (f) provides:

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[8] A 25-year-to-life sentence is also mandatory if at least two of the circumstances specified in subdivision (e) are pled and proved. (§ 667.61, subd. (a).) A 15-year-to-life sentence is mandatory if only one of the subdivision (e) special circumstances is pled and proved. (§ 667.61, subd. (b).) Defendant was charged with two section 667.61, subdivision (e) special circumstances: (1) "The defendant engaged in the tying or binding of the victim or another person in the commission of the present offense" (§ 667.61, subd. (e)(5)) and (2) "The defendant personally used a dangerous deadly weapon or a firearm in the commission of the present offense . . . ." (§ 667.61, subd. (e)(3).) The deadly weapon special circumstance was dismissed. Although the jury found true the "tying and binding" special circumstance, that finding would support only a 15-year-to-life sentence. Under section 667.61, subdivision (f), the greater 25-year-to-life sentence based on the one subdivision (d) special circumstance was necessary.

> "If only the minimum number of circumstances specified in subdivision (d) . . . have been pled and proved, that circumstance . . . shall be used as the basis for imposing the term provided in subdivision (a) . . . , rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section. . . ."

Under subdivision (f) of section 667.61, when only one subdivision (d) special circumstance is found true, that circumstance must be used to sentence defendant pursuant to section 667.61, subdivision (a) "rather than" used to sentence him under another provision of law unless: (1) the other provision of law provides for greater sentence or (2) sentence under the other provision of law can be imposed in addition to a 25-year sentence imposed pursuant to section 667.61. In other words, with exceptions not relevant here, when conduct is used to support a section 667.61 life sentence, the same conduct cannot also be punished separately. In *People v. Perez* (2015) 240 Cal.App.4th 1218, for example, the court vacated a one-year enhancement for use of a deadly weapon because use of a deadly weapon was one of the circumstances upon which the trial court based a 25-year-to-life sentence pursuant to section 667.61, subds. (a) and (e). (*Perez*, at p. 1224.)

Section 654, subdivision (a) allows multiple convictions arising out of a single act or omission, but bars multiple punishment for multiple convictions arising out of a single act. It requires the act to be punished under the provision that provides the longest potential term of imprisonment. Section 654 applies to sentence enhancements. (*People v. Mesa* (2012) 54 Cal.4th 191, 195.) In *Mesa*, our Supreme Court held that separate punishment for assault with a firearm (§ 245 subd. (a)(2)) and felon in possession (former § 12021, subd. (a)(1)) both with a criminal street gang enhancement (§ 186.22, subd. (b)) and also for active participation in a criminal street gang (§ 186.22, subd. (a)) violated section 654. "Section 654 applies where the 'defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself.' [Citation.]" (*Id*. at p. 198.) Because the

substantive gang crime carried the lesser sentence, section 654 required that sentence to be stayed. (*Id*. at p. 201.) Thus, under both sections 654, subdivision (a) and section 667.61, subdivision (f), the conduct underlying a section 667.61, subdivision (d) special circumstance (in this case torture) cannot be used to punish the defendant under both section 667.61, subdivision (a) and some other statute (in this case § 206, torture). Both statutes require the defendant to be punished under the provision of law that provides for the greatest sentence.

Here, Alvarado was convicted of forcible sexual penetration with a torture special circumstance (count 1) and of torture with a great bodily injury enhancement (count 5).[9] Because the 25-year-to-life sentence for forcible sexual penetration with a torture special circumstance is greater than the sentence for torture with a great bodily injury enhancement (life plus three years), the trial court sentenced Alvarado to 25 years to life on count 1 (forcible sexual penetration). It sentenced defendant to life in prison on count 5 (torture), but stayed sentence on count 5 pursuant to section 654 "based upon the use of the torture allegation in count 1 . . . ." The minute order states: "The court orders the life sentence in this count to be stayed pursuant to Penal Code section 654. If said section does not apply, then the sentence is to be run concurrent to the sentence on count 1."[10] On the abstract of judgment, boxes for both "654 Stay" and "Concurrent" are checked as to count 5.

To the extent section 667.61, subdivision (f) prohibits punishing the same conduct as a special circumstance and as a substantive offense, the trial court's sentence complies with the statute. Defendant has cited to no authority, and our independent research has

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9 Alvarado was charged with the following two section 667.61, subdivision (d) special circumstances: (1) "The defendant inflicted . . . torture on the victim . . . in the commission of the present offense . . . ." (§ 667.61, subd. (d)(3)) and (2) "The defendant personally inflicted great bodily injury on the victim in the commission of the present offense . . . ." (§ 667.61, subd. (d)(6).) The jury found true only the torture special circumstance. (§ 667.61, subd. (d)(3).)

10 The People agree that the abstract of judgment should be corrected to delete the reference to "concurrent" sentences on count 5.

found none, requiring the trial court to expressly state on the record that it is staying sentence on another count pursuant to section 667.61, subdivision (f). Nor have we found any authority that it is error to stay a sentence pursuant to section 654, when that sentence may also be stayed pursuant to section 667.61.

E. Alvarado's Presentence Custody Credits

Alvarado contends, and the People concede, that Alvarado was given 420 too few days of presentence custody credits. We agree and modify the judgment accordingly.

DISPOSITION

The judgment is modified to reflect that Alvarado is awarded 1,013 days of presentence custody credit, comprised of 881 days in actual custody and 132 days of good time/work time. The abstract of judgment is modified to reflect that sentence on count 5 is stayed; any indication on the abstract of judgment that sentence on count 5 is "concurrent" should be deleted. As so modified, the judgment is affirmed. The clerk of the superior court is directed to forward a certified copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.